No. 16,442

IN THE

United States Court of Appeals

For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of GENERAL EQUIPMENT CO., a copartnership composed of Wallace D. Loe and John O. Currence, Bankrupt,

Appellant,

vs.

B. H. TANNER,

Appellee.

APPELLANT'S CLOSING BRIEF.

SHAPRO & ROTHSCHILD,
JAMES M. CONNERS,
ARTHUR P. SHAPRO,
1450 Chapin Avenue, Burlingame, California,
Attorneys for Appellant.

DANIEL ARONSON, JR.,
1450 Chapin Avenue, Burlingame, California,
Of Counsel.

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SUMMARY OF APPELLANT'S POSITION.

Appellant's position will be more fully stated hereafter in connection with his reply to specific points advanced by Appellee.

It is Appellant's major premise that the chattel mortgage, which is the basis of Appellee's secured claim, was not properly acknowledged as required by the laws of the State of California, which premise is supported by the testimony and by Conclusion number 2 of the Referee's Order (T. R. pp. 7-8) cited by Appellant in his Opening Brief on page 14.

The next premise is that the testimony of the notary public was improperly admitted over Appellant's objection and that had his objection been properly sustained by the Referee, then the Referee would have ruled in favor of Appellant (see Conclusion number 2 of said Referee, supra), wherein the Referee concluded that the chattel mortgage was properly executed, acknowledged and recorded and thus a valid and existing lien on the personal property *solely by reason of the testimony of the notary public.*

COMMENT UPON APPELLEE'S POINTS.

On page 2 of Appellee's Brief, he states that the witnesses Tanner, Montgomery & Hutchison testified only to the signing of the mortgage and gave no testimony concerning the acknowledgment. We submit that Appellee is engaging in the most technical form of semantics since the testimony of these three witnesses, the pertinent portions of which are set forth in Appellant's Opening Brief, pages 7 and 8, was that the mortgage was signed at the place of business and that Tanner (mortgagee) then took the document to the notary. This is contrary to the notary's testimony that it was "acknowledged" by the mortgagors to him. The three witnesses, other than the notary, testified, in effect, that the mortgagors did not appear before the notary or at any time acknowledge their signatures to the notary. Mr. Weingarten's testimony that he "took the acknowledgment on that date" (T. R.

p. 38) and "after taking the acknowledgment" (T. R. p. 39) is merely his conclusion at best.

The requirements of acknowledgment under the laws of the State of California are as set forth in Government Code Section 27287, Civil Code Sections 1188 and 1189, and 2957 (cited in Appellant's Opening Brief, pages 8, 9 and 10).

> "Acknowledgment is formal admission, before an officer, by one who has executed an instrument, that the instrument is his act and deed."
>
> *Jemison v. Howell,* 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511.

> "An acknowledgment is an act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or Court and declares or acknowledges the same to be his genuine and voluntary act and deed."
>
> *Trowbridge v. Bisson,* 44 N.W. 2d 810, 812, 153 Neb. 389.

> "An acknowledgment is a formal declaration or admission before authorized public officer by person who has executed instrument that such instrument is his act and deed."
>
> *Wilde v. Buchanan,* 303 S.W. 2d 518, 519;
>
> *Pardo v. Creamer,* 310 S.W. 2d 218, 221.

Appellee on page 2, and again on page 3, of his Brief, states that the testimony of the notary public did not impeach, but in fact corroborated and supplemented, the testimony of his previous witnesses. This statement is contrary to the facts. See testimony of

Appellee's witnesses above referred to and Conclusion number 2 of the Referee's Order. Further, his testimony was contrary to the purpose for which the notary was called.

"Mr. Haas. I have four Affidavits; one of Mr. Weingarten——

Mr. Shapro. I object to any ex parte affidavits; if any evidence is to be offered I insist that it be here in the form of testimony, and if Mr. Haas desires a continuance for that purpose I will not agree to accept any ex parte affidavits.

The Court. With the objection on the part of the Trustee I have no alternative but to continue it; in other words, he is certainly entitled to an opportunity to examine the four witnesses or affiants; but as far as the Court is concerned it would be without prejudice to your clients' rights; you will be afforded whatever opportunity you desire to furnish any testimony. Anything further, gentlemen?

Mr. Shapro. Nothing further as far as the Trustee is concerned.

Mr. Haas. Nothing further.

The Court. Do you gentlemen desire that the matter be carried until you produce this witness?

Mr. Haas. I was going to produce him to substantiate the testimony of Montgomery and Hutchison. They have already testified; if you want Mr. Weingarten here——

Mr. Shapro. Do you want him here?

Mr. Haas. I don't think he can be here for some time, and frankly I don't think he can add anything further, other than the fact that he is an attorney and notary and would testify to the same effect." (T. R. pp. 34-35.)

On page 3 of Appellee's Brief reference is made to a delay in the execution of the mortgage and to avoid any possible confusion as to the issues, Appellant's position is that he does not challenge the validity of the mortgage on the basis of a delay in recordation but rather on the ground that it was not properly acknowledged.

> "Mr. Shapro. At the opening you stated that your only objection to the mortgage was delay in recordation. On the basis of the testimony I desire to have it understood it is on the ground that the mortgage was not properly acknowledged as required by statute, anyway." (T. R. p. 35.)

Appellant concedes that a notary public is a competent witness to testify in a proper case as to the date of execution, etc., but in this case, the notary public was called as a witness and the net result of his testimony, admitted over Appellant's objection, was to impeach the testimony of *Appellee's own witnesses* whose testimony was such that there was no acknowledgment as required by the laws of the State of California.

CONCLUSION.

In conclusion, it is respectfully submitted that the chattel mortgage here in question was not properly acknowledged as required by the laws of the State of California, and thus not entitled to recordation and thus void as against Appellant herein in that the testimony of the notary public (upon which the

Referee's Order was based) was improperly admitted over objection, and the Order of the District Judge here complained of should be, by this Court, reversed and remanded with instructions to the District Court to make and enter an Order in said bankruptcy proceedings that said mortgage was and is invalid as against Appellant and that Appellant be authorized to sell the personal property covered by said chattel mortgage free and clear of the lien thereof.

Dated, September 14, 1959.

SHAPRO & ROTHSCHILD,
JAMES M. CONNERS,
By ARTHUR P. SHAPRO,
Attorneys for Appellant.

DANIEL ARONSON, JR.,
Of Counsel.